

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation**

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code sections 133, 139.5 and 5307.3, proposes to modify existing regulations, by amending Subchapter 1 of Chapter 4.5, Title 8, California Code of Regulations, commencing with Section 9710.

The regulations concern procedures to be followed by Workers' Compensation Referees in order to comply with Labor Code section 123.5(a) provisions which prohibit referees from receiving their salary should a cause before them remain pending and undetermined for ninety days or more after it has been submitted for decision.

PUBLIC HEARING

Public hearings have been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the subjects noted above, on the following dates:

Date:	November 24, 1997 - (Monday)
Time:	10:00 am to 5:00 PM or conclusion of business.
Place:	Public Utilities Commission - Auditorium 505 Van Ness Ave. San Francisco, CA
Date:	November 25, 1997 - (Tuesday)
Time:	10:00 am to 5:00 PM or conclusion of business.
Place:	107 S. Broadway, Room 1138 Los Angeles, CA

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments.

AUTHORITY AND REFERENCE

The Administrative Director of the Division of Workers' Compensation, is undertaking this regulatory action pursuant to the authority vested in him by Labor Code sections 133, 139.5 and 5307.3, to modify existing regulations.

INFORMATIVE DIGEST AND PLAIN ENGLISH OVERVIEW

The Administrative Director of the Division of Workers' Compensation proposes to amend existing regulations concerning procedures to be followed by workers' compensation referees in order to be in compliance with Labor Code section 123.5(a) requirements for receipt of salary. Amendments are proposed which will define terms used in both Labor Code section 123.5(a) as well as Sections 9714 and 9714.5. Additional amendments address procedures to be followed by referees who receive salary by automatic direct deposit, as well as revise language contained in the salary affidavit signed by referees. Lastly, additional changes without regulatory effect are made to update terminology.

1. Amendments to Section 9712

Labor Code section 123.5(a), as well as the affidavit contained in Section 9714.5, both contain the terms "pending and undetermined" and "submitted." While existing Section 9712 defines the term "undetermined", it does not provide a specific definition for the term "pending." Secondly, existing Subsection (d) defines the term "submission", when the term "submitted" is actually used in the statute and regulations. It is proposed that Section 9712 be amended to also define the term "pending" and to substitute the term "submitted" in place of "submission."

2. Amendments to Sections 9714 and Section 9714.5

Labor Code section 123.5(a) provides that a Workers' Compensation Referee may not receive his or her salary when any cause remains pending and undetermined for ninety days or more after it has been submitted for decision. Existing Sections 9714 and 9714.5 provide for an affidavit which must be executed by a referee prior to receipt of salary, declaring upon information and belief that no cause remains pending and undetermined for ninety or more days after being submitted. In order to obtain such information and belief, a referee currently must monitor and supervise his or her cases. Sections 9714 and 9714.5 are amended to provide that a referee must declare in the affidavit that he or she has personally reviewed submitted files and has personal knowledge that no cause is still pending and undetermined.

CHANGES WITHOUT REGULATORY EFFECT:

3. Amendments to Section 9710

Section 9710 is amended to clarify and simplify the reference note by listing the actual Labor Code sections which may be referenced.

4. Amendments to Section 9712, 9713, 9714 and 9715:

The terms "judge", "judges" and "judge's" are replaced with "referee", "referees" and "referee's" in order to be consistent with previously promulgated regulations.

5. Amendments to Section 9714.5

“Industrial Accidents” is replaced with “Workers’ Compensation” to reflect the current title of the Division.

6 Amendments to Sections 9710, 9712, 9714, and 97114.5

Subsection (a) is added to all citations to Labor Code section 123.5 to reflect previously enacted changes to the format of Labor Code section 123.5.

STATE REIMBURSABLE MANDATE

The Administrative Director of the Division of Workers’ Compensation has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district.

COST OR SAVINGS TO LOCAL AGENCIES OR SCHOOL DISTRICTS

The regulations proposed herein will not impose costs or result in savings for local agencies and school districts.

COST OR SAVINGS TO STATE AGENCIES

The proposed regulations will not impose costs or result in savings for State agencies.

COST OR SAVINGS IN FEDERAL FUNDING TO STATE

The proposed regulations will not affect any federal funding.

SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS

The Administrative Director has concluded that the proposed regulations will not have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states.

ECONOMIC IMPACT ON PRIVATE PERSONS OR BUSINESSES

The Administrative Director has determined that the proposed regulations will not have an adverse economic impact on private persons or businesses.

ECONOMIC IMPACT ON SMALL BUSINESSES

The Administrative Director has determined that the proposed regulations will not have an impact on small businesses.

ASSESSMENT OF EFFECTS ON JOB AND/OR BUSINESS CREATION, ELIMINATION OR EXPANSION

The Administrative Director has determined that the proposed regulations will have no effect on the creation or elimination of jobs or existing businesses within California, or affect the expansion of current California businesses.

PLAIN ENGLISH REQUIREMENTS CONCERNING SMALL BUSINESSES

The Administrative Director has determined that the proposed regulations will not impact on small businesses. Additionally, because of the subject matter and technical nature of the regulations proposed, the Administrative Director has determined that it is not feasible to draft the regulations in plain English. However, a non-controlling plain English summary of the regulations is available from the agency contact person named in this notice.

IMPACT ON HOUSING COSTS

The proposed regulations will have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES

The Administrative Director must determine that no alternative would be more effective in carrying out the purpose for which these regulations are proposed, nor would it be as effective and less burdensome to affected persons than the proposed actions.

PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing. In addition, any person may submit written comments on the proposed regulations, prior to the public hearing to:

Ms. Aurora Medina
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Unless submitted prior to or at the public hearing, all written comments must be received by the agency contact person, no later than 5:00 p.m. on November 25, 1997. Equal weight will be accorded to oral and written materials.

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

An Initial Statement of Reasons has been prepared for the proposed regulations, in addition to the Informative Digest included in this Notice. The Initial Statement of Reasons and the text of the proposed regulations will be made available for inspection or provided upon written request. Please direct all requests to the contact person identified below.

CONTACT PERSON

Any interested person may inspect a copy or direct questions about the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Division of Workers' Compensation, 45 Fremont Street, Room 3160, San Francisco, CA 94105, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Ms. Aurora Medina
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the contact person is (415) 975-0700.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be available for public comment for at least 15 days prior to the date on which the regulations are adopted. There are no statutory or other notice requirements other than those contained in the Administrative Procedures Act, (Government Code section 11340, *et seq.*) applicable to the adoption of these proposed regulations.

AUTOMATIC MAILING

A copy of this Notice, including the Informative Digest, will automatically be sent to those interested persons on the mailing list of the Administrative Director of the Division of Workers' Compensation.

If adopted, the regulations as amended will appear sequentially in the California Code of Regulations at Title 8, Chapter 4.5, Subchapter 1, commencing with Section 9710.

Dated: _____

Administrative Director,
Division of Workers' Compensation

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

INITIAL STATEMENT OF REASONS

Subject Matter of Proposed Regulations:

Receipt of Salary by Workers' Compensation Referees:

**Definitions, Revised Procedures for Compliance with Labor Code Section 123.5(a),
Revised Salary Affidavit.**

BACKGROUND TO REGULATORY PROCEEDING:

Labor Code section 123.5(a) prohibits a Workers' Compensation Referee from receiving his or her salary while any cause before the referee remains pending and undetermined for ninety days or more after the cause has been submitted for decision. The Administrative Director has previously promulgated regulations mandating procedures to be followed by all referees to ensure compliance with Labor Code section 123.5(a).

(1) Section Amended: 9712

Problem Addressed:

Currently, subsection (c) defines only the term "undetermined" and subsection (d) provides a definition for the term "submission". In contrast, Labor Code section 1235.5(a), as well as the salary affidavit contained in regulation Section 9714.5, use the term "pending and undetermined" and contain the term "submitted" in lieu of "submission" when discussing the requirement of a referee to issue a decision prior to ninety days after a cause has been submitted. In order to be consistent with language in both Labor Code section 123.5 and Section 9714.5, the term "pending" should be defined in addition to "undetermined", and "submission" should be replaced by "submitted."

Specific Purpose of Amendments to Section 9712:

To provide a standard and consistent definition for the term "pending and undetermined", as well as to substitute the term "submitted" in place of "submission" in order to be consistent with language contained in Labor Code section 123.5(a), and the affidavit provided in regulation Section 9714.5.

Factual Basis That Amendment is Necessary

Labor Code section 123.5(a) provides that a Workers' Compensation Referee may not receive his or her salary when any submitted cause remains pending and undetermined for ninety days or more. Prior to receipt of his or her salary, a referee must execute an affidavit declaring under penalty of perjury that he or she has issued decisions in compliance with the time frames contained in Labor Code section 123.5(a). While both Labor Code section 123.5(a) and the required affidavit use the terms "pending and undetermined" and "submitted", Section 9712

solely provides a definition for the term “pending”, and defines the term “submission” instead of “submitted.” By amending Section 9712 to provide definitions for the terms “pending” and “submitted”, further guidance will be provided to referees, administrative boards and courts, since the language of Section 9712 will be consistent with Labor Code section 123.5(a) and Section 9714.5.

Business Impact

The regulation will not have a significant effect on businesses.

Specific Technologies or Equipment

The regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No alternative was considered that would be either more effective than or equally as effective as and less burdensome than the proposed regulations.

(2) Sections Amended: 9714 and 9714.5.

Problem Addressed:

Currently, Sections 9714 and 9714.5 provide that the salary affidavit submitted by each Workers' Compensation Referee declaring compliance with Labor Code section 123.5(a), is based on the referee's information and belief. While it is clear that a referee has the duty to obtain such information and belief by monitoring and supervising his or her cases, existing language in the affidavit does not specifically require the referee to declare that he or she has taken actual steps to personally ascertain that no submitted cause remains pending and undetermined for ninety days or more.

When Section 9714 was originally adopted, referees did not have the option of receiving their salary by automatic direct deposit. Section 9714 is amended to provide a consistent procedure to prevent referees who participate in automatic direct deposit, and have not submitted a timely affidavit, from having access to salary funds.

Specific Purpose of Amendments to Section 9714 and 9714.5.

To foster the issuance of more timely decisions on submitted causes. In addition, Section 9714 is further amended to assure that referees who obtain salary by automatic direct deposit are denied the benefit of their salary should they fail to submit timely affidavits declaring they are in compliance with Labor Code section 123.5(a).

Factual Basis That Amendments are Necessary

Labor Code section 5313 mandates that a referee's decision issue within thirty days of case submission. Labor Code section 123.5(a) prohibits a referee from receiving his or her salary where any case remains pending and undetermined for ninety days after it has been submitted

for decision. The California Code of Judicial Ethics requires that a referee “shall dispose of all judicial matters fairly, promptly, and efficiently.” In order to comply with these provisions, a referee must monitor and supervise his or her cases. The proposed language to be added to both Sections 9714 and 9714.5, requiring a referee to declare that he or she has personally reviewed his or her submitted causes and has personal knowledge that no cause remains undecided for ninety days or more, promotes strict compliance with Labor Code section 123.5(a) and makes clear the existing obligation to monitor and supervise cases.

Currently, Section 9714 does not provide procedures for preventing a referee, who participates in automatic direct deposit and has not filed a timely signed salary affidavit, from receiving his or her salary. Proposed amendments to Section 9714 would implement measures to assure that a referee who fails to comply with Labor Code section 123.5(a), would be denied the benefit of his or her salary.

Business Impact

The regulations will not have a significant effect on businesses.

Specific Technologies or Equipment

The regulations do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No alternative was considered that would be either more effective than or equally as effective as and less burdensome than the proposed regulations.

CHANGES WITHOUT REGULATORY EFFECT:

(3) Section Amended: 9710

Section 9710 is being amended to clarify and simplify the reference note by listing the actual Labor Code sections which may be referenced.

(4) Sections Amended: 9712, 9713, 9714 and 9715:

The terms “judge” “judges” and “judge’s” are replaced with “referee”, “referees” and “referee’s” in order to be consistent with previously promulgated regulations.

(5) Section Amended: 9714.5

“Industrial Accidents” is replaced with “Workers’ Compensation” to reflect the current title of the Division.

(6) Sections Amended: 9710, 9712, 9714, and 9714.5

Subsection (a) is added to all citations to Labor Code section 123.5 to reflect previously enacted changes to the format of Labor Code section 123.5.

CHAPTER 4.5
DIVISION OF WORKERS' COMPENSATION
SUBCHAPTER 1
ADMINISTRATIVE DIRECTOR - ADMINISTRATIVE RULES

Article 1.5

Receipt of Salary by Workers' Compensation Judge Referee

§9710. Authority.

The rules and regulations contained in Article 1.5 are adopted pursuant to the authority contained in Sections 123, 123.5(a) and 133 of the California Labor Code.

Note: Authority cited: Sections 123, 123.5(a), and 133, Labor Code. Reference: ~~Chapter 402 and 414 Statutes of 1980~~ Section 123.5(a) and 5313, Labor Code.

§9711. Operative Date.

The provisions of this Article shall first apply to cases submitted after January 1, 1981, and the affidavit shall first be required for the April 1981 pay period. For the purposes of this Article, all cases submitted prior to January 1, 1981 shall be deemed to have been submitted on January 2, 1981.

Note: Authority cited: Sections 123, 123.5(a), and 133, Labor Code.
Reference: Section 123.5(a) and 5313, Labor Code.

§9712. Definitions

For the purposes of this Article and Section 123.5(a) of the Labor Code, the following definitions shall apply:

- (a) "Salary" shall include ordinary pay, but shall not include sick leave pay, industrial disability leave or non-industrial disability insurance substantiated by a physician's report.
- (b) "Cause" shall mean a cause of action arising out of the substantive rights, liabilities and duties provided for in Section 132(a) and 139.5, and in Divisions 4 and 4.5 of the Labor Code which is pending before a Workers' Compensation Judge Referee for decision.
- (c) "Pending and "Undetermined" means that the Workers' Compensation Judge's Referee's decision has not been filed in the record.
- (d) ~~"Submission."~~ "Submitted" ~~for the purposes of this Article~~ means the closing of the record for the receipt of further evidence or argument.

Note: Authority cited: Sections 123, 123.5(a), and 133, Labor Code.
Reference: Section 123.5(a) and 5313, Labor Code.

§9713. Receipt of Salary.

A Workers' Compensation ~~Judge Referee~~ may not receive his or her salary while any cause before the Workers' Compensation ~~Judge Referee~~ remains pending and undetermined for ninety (90) days after it has been submitted for decision.

Note: Authority cited: Sections 123, 123.5(a), and 133, Labor Code.

Reference: Section 123.5(a) and 5313, Labor Code.

§9714. Procedures for Compliance With Labor Code Section 123.5(a)

(a) In order to receive his or her salary for ~~the April 1981~~ each pay period ~~or any pay period thereafter~~, at some time before 5:00 p.m. on the last working day of each State payroll period, the Workers' Compensation ~~Judge Referee~~ shall submit to the Division of Industrial Accidents, Workers' Compensation ~~in the manner set forth in the Policy and Procedural Manual of that Division~~, an affidavit based upon ~~information and belief~~ personal knowledge in the form prescribed by Section 9714.5 and executed under penalty of perjury, declaring that he or she has personally reviewed all ~~no~~ causes submitted before him or her and no such cause remains pending and undetermined for a period of ninety (90) days or more.

(b) When a Workers' Compensation Referee who receives salary by automatic direct deposit does not timely submit the affidavit required by subsection (a), he or she shall, before 5:00 p.m. on the last working day of the State payroll period, deliver to the Presiding Workers' Compensation Referee of the district office to which the referee is assigned a money order or cashier's check for the amount of salary automatically deposited.

Note: Authority cited: Sections 123, 123.5(a), and 133, Labor Code.

Reference: Section 123.5(a) and 5313, Labor Code.

§9714.5 Affidavit.

Department of Industrial Relations
Division of ~~Industrial Accidents~~ Workers' Compensation
Workers' Compensation Appeals Board

Affidavit
(Labor Code Section 123.5(a))

I, _____, (Name) Workers' Compensation Judge Referee in the _____, (City) office of the Division of ~~Industrial Accidents~~ Workers' Compensation/Workers' Compensation Appeals Board, Department of Industrial Relations, State of California, declare ~~to the best of my information and belief that I have personally reviewed my submitted causes and have personal knowledge that~~ no cause remains pending and undetermined that has been submitted to me for the period of ninety (90) days prior to the first day of _____, 19_____. (Date) (Year)
Executed on _____ (Date) at _____ (City) California. I declare under penalty of perjury that the foregoing is true and correct.

(Signature)
Workers' Compensation Judge Referee

§9715. Procedures for Submitting a Cause for Decision.

Minutes of Hearing must be prepared at the conclusion of each hearing and filed in the record. Workers' Compensation Judges Referees are to follow the provisions of Rules and Procedure Section 10566. Each set of minutes must include a disposition which includes the time and action, if any, required for submissions.

Thereafter, any change in or modification of the disposition must be served on all parties forthwith, together with the statement of the reasons for the change of disposition.

A hearing has not been concluded if the disposition includes an order taking off calendar or an order of continuance for further hearing with or without notice. Continuances and further hearings are governed by Rules of Practice and Procedure Sections 10548 and 10560.

Note: Authority cited: Sections 123, 123.5(a), and 133, Labor Code.
Reference: Section 123.5(a) and 5313, Labor Code.